Cornell International Law Journal

Volume 8
Issue 1 *December 1974*

Article 6

Equal Protection Review of State Statutes Restricting Alien Employment

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EQUAL PROTECTION REVIEW OF STATE STATUTES RESTRICTING ALIEN EMPLOYMENT

The early common law of the United States extended a friendly reception to the alien, and as long as the demand for human resources greatly exceeded the native supply, there were no general restrictions placed on aliens with respect to employment. As America changed from an agrarian to an urbanized industrial society, however, native fear of economic competition induced a change in the treatment accorded aliens.[1] In an attempt to protect their citizens from alien competition, states enacted legislation limiting employment opportunities available to non-citizens. Lacking an effective voice at the polls,[2] aliens turned to the courts, where some limited protection against discriminatory legislation was found in the Equal Protection Clause of the Fourteenth Amendment. However, a permissive standard of judicial review enabled the states to continue discriminatory regulation of alien employment.

The more recent adoption of a strict standard of judicial review, along with the recognition of alienage as a suspect classification under the Fourteenth Amendment, has raised some serious questions concerning the constitutional validity of a number of discriminatory employment statutes. This Note will examine the judicial development of this standard and consider the implications of this development on the future validity of state legislation which attempts to deny public employment to aliens.

I

PERMISSIVE STANDARD OF REVIEW

The permissive standard of judicial review formerly applied under the Equal Protection Clause with regard to alien employment merely

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1. State alien restrictions and the political situation occasioning their adoption are discussed in M. KONVITZ, THE ALIEN AND THE ASIATIC IN AMERICAN LAW 117-211 (1946).

For a commentary on some of the forces involved in producing restrictive statutes such as are found in the Chinese Exclusion Case, 130 U.S. 581, 594-95 (1889), see Comment, *Equal Protection and Supremacy Clause Limitations on State Legislation Restricting Aliens,* 1970 UTAH L. REV. 136 n.4.

2. During the nineteenth century, the laws of at least 22 states and territories allowed aliens the right to vote. By 1928, laws were passed in every state disenfranchising aliens. *See* M. KONVITZ, *supra* note 1, at 1.

required that the statutory classification be rationally related to a legitimate state interest.[3] Under such a standard, constitutional protection often proved illusory, since whenever the purpose of a classification was challenged on equal protection grounds, the courts attributed to the challenged classification either that purpose thought to be most probable[4] or any reasonably conceivable purpose which would support the constitutionality of the classification.[5] Moreover, whether a classification was irrational, arbitrary, or capricious in a constitutional sense was, in the end, a relative matter. Thus, a state law was surrounded with a presumption of validity, rebuttable only by a showing that there could be no rational relation between the restriction and any reasonable state interest.[6]

Although it has long been recognized that aliens are entitled to protection under the Fourteenth Amendment,[7] the early adherence of the Supreme Court to a permissive standard of review enabled the states to limit or deny employment to aliens. The justification for such discriminatory state action was founded upon two general theories: the "proprietary interest rationale" and the "police power rationale."[8]

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3. *See, e.g.*, McGowan v. Maryland, 366 U.S. 420, 425-27 (1961); Morey v. Doud, 354 U.S. 457, 465 (1957); Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911).

4. *See, e.g.*, F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920).

5. *See, e.g.*, Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582 (1961); McGowan v. Maryland, 366 U.S. 420, 426 (1961); *Developments in the Law: Equal Protection*, 82 HARV. L. REV. 1065, 1076-78 (1969).

6. McGowan v. Maryland, 366 U.S. 420, 425-26 (1961):

> State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

Therefore, legislation which differentiated between two classes was unconstitutional only if irrational, arbitrary, or capricious. *E.g.*, Bayside Fish Flour Co. v. Gentry, 297 U.S. 422, 429 (1936); Arkansas Natural Gas Co. v. Arkansas R.R. Comm'n, 261 U.S. 379, 384 (1923). *See* McGowan v. Maryland, 366 U.S. at 425-26 and cases cited therein; Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 95 n.28 (1966).

7. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886):

> The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. . . . These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.

8. One commentator has further analyzed these two general theories as follows:

> (1) The state's proprietary interest over the subject matter of the occupation, such as the taking of fish or game;
> (2) The state's proprietary interest over the position itself, as in employment in government or on public works;
> (3) The state's police power, under which it may
> (a) deny aliens employment in enterprises (such as the sale of intoxicating

Under the proprietary interest rationale, a state could favor its citizens over aliens in the distribution of public property, since a state held its property and resources in trust for its citizens as owners.[9] It followed, then, that the opportunity to be employed in public enterprises was a privilege which the state could grant or withdraw as it pleased.[10] By virtue of its police power, a state could legitimately deny employment to aliens in those enterprises thought to be of a harmful or anti-social nature and it could establish reasonable classifications in the interests of public health, safety, morals, or welfare.[11] Thus, the proprietary in-

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liquor or the operation of a pool room) judged to be of such a dangerous or anti-social nature that the state could prohibit them altogether, or

(b) make reasonable classifications in the interest of the public health, safety, morals and welfare.

Note, *Constitutionality of Restrictions on Aliens' Right to Work,* 57 COLUM. L. REV. 1012, 1014 (1957).

9. The Supreme Court has relied upon the proprietary interest rationale to uphold statutes that limit the right of non-citizens to engage in exploitation of a state's natural resources so as to preserve common property for citizens. *E.g.,* Patsone v. Pennsylvania, 232 U.S. 138 (1914); McCready v. Virginia, 94 U.S. 391 (1876).

10. The "special public interest doctrine," one aspect of the proprietary interest rationale, justified state statutes that treated citizens and non-citizens differently on the ground that such laws were necessary to protect special interests of the state or its citizens. *E.g.,* Ohio *ex rel.* Clarke v. Deckebach, 274 U.S. 392 (1927); Heim v. McCall, 239 U.S. 175 (1915); Rok v. Legg, 27 F. Supp. 243 (S.D. Cal. 1939); Lelande v. Lowery, 26 Cal. 2d 224, 157 P.2d 639 (1945); Lee v. City of Lynn, 223 Mass. 109, 111 N.E. 700 (1916); People v. Crane, 214 N.Y. 154, 108 N.E. 427 (1915), *aff'd,* 239 U.S. 195 (1915).

In Truax v. Raich, 239 U.S. 33, 39-40 (1915), the Supreme Court, in striking down an Arizona statute restricting the employment of aliens, emphasized that:

> [t]he discrimination defined by the act does not pertain to the regulation or distribution of the public domain, or of the common property or resources of the people of the State, the enjoyment of which may be limited to its citizens as against both aliens and the citizens of other States.

In Crane v. New York, 239 U.S. 195 (1915), the Supreme Court affirmed the judgment in People v. Crane, 214 N.Y. 154, 108 N.E. 427 (1915), upholding a New York statute prohibiting employment of aliens on public works projects. The opinion of the New York Court of Appeals contained Mr. Justice Cardozo's well-known observation:

> To disqualify aliens is discrimination indeed, but not arbitrary discrimination, for the principle of exclusion is the restriction of the resources of the state to the advancement and profit of the members of the state. Ungenerous and unwise such discrimination may be. It is not for that reason unlawful. . . .
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> The state in determining what use shall be made of its own moneys, may legitimately consult the welfare of its own citizens rather than that of aliens. Whatever is a privilege rather than a right, may be made dependent upon citizenship. In its war against poverty, the state is not required to dedicate its own resources to citizens and aliens alike. . . .

214 N.Y. at 161, 164, 108 N.E. at 429, 430.

11. *E.g.,* Ohio *ex rel.* Clarke v. Deckebach, 274 U.S. 392 (1927); Anton v. Van Winkle, 297 F. 340 (D.C. Ore. 1924); State *ex rel.* Balli v. Carrel, 99 Ohio St. 285, 124 N.E. 129 (1919) (operating pool room); Asakura v. Seattle, 122 Wash. 81, 210 P. 30 (1922), *rev'd,* 265 U.S. 332 (1924) (acting as pawnbrokers, *rev'd,* alien's right to engage in trade guaranteed by treaty with Japan); Morin v. Nunan, 91 N.J.L. 506, 103 A. 378 (Sup. Ct.

terest and police power rationales formed the bases of a comprehensive discriminatory scheme which effectively eliminated aliens from many forms of private and public employment.

A. The Proprietary Rationale

Even though the Supreme Court had clearly established by 1915 that it was unconstitutional to bar aliens as a class from the general business of the community,[12] the exclusion of aliens from public employment continued to be sustained. The state was viewed as having the same rights as a private employer,[13] and, therefore, was unhampered in this respect by the Fourteenth Amendment.[14] Since public employment was theoretically a privilege which the state could grant or deny as it saw fit, the state had the power to discriminate against aliens for any legitimate state interest, including protection of its labor market.[15]

However, in *Takahashi v. Fish & Game Commission,*[16] the Supreme

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1918); Gizzarelli v. Presbrey, 44 R.I. 333, 117 A. 359 (1922); *contra,* Magnani v. Harnett, 257 App. Div. 487, 14 N.Y.S.2d 107 (3d Dep't 1939), *aff'd without opinion,* 282 N.Y. 619, 25 N.E.2d 395, *cert. denied,* 310 U.S. 642 (1940) (serving as chauffeurs).

See State v. Stevens, 78 N.H. 268, 99 A. 723 (1916) (selling lightning rods); *In re* Parrott, 1 F. 481 (C.C. Cal. 1880) (overthrowing restriction on being employed by corporations); State v. Travelers Ins. Co., 70 Conn. 590, 40 A. 465 (1898) (dictum) (holding stock in, or forming corporations).

12. Truax v. Raich, 239 U.S. 33 (1915).

13. The rights of a private employer to maintain a policy of excluding resident aliens from employment has been unsuccessfully challenged as being a violation of the prohibition against discrimination on the basis of national origin contained in section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1970). Espinoza v. Farah Mfg. Co., 462 F.2d 1331 (5th Cir. 1972), *aff'd,* 414 U.S. 86 (1973). *See* Note, *Civil Rights—Employment—National Origin Discrimination and Aliens,* 51 Texas L. Rev. 128 (1972).

14. *E.g.,* Heim v. McCall, 239 U.S. 175 (1915); Atkin v. Kansas, 191 U.S. 207 (1903). *See* Comment, *Equal Protection and Supremacy Clause Limitations on State Legislation Restricting Aliens, supra* note 1, at 141 n.25; Note, *Constitutionality of Restrictions on Aliens' Right to Work, supra* note 8, at 1017 n.31; Note, *The Right to Work for the State,* 16 Colum. L. Rev. 99 (1916); Note, *National Power to Control State Discrimination Against Foreign Goods and Persons: A Study in Federalism,* 12 Stan. L. Rev. 355 (1960). *See generally,* M. Konvitz, *supra* note 1.

15. Prior to the decisions of the New York Court of Appeals in Heim v. McCall, 214 N.Y. 629 (memorandum decision), *aff'd,* 239 U.S. 175 (1915), and People v. Crane, 214 N.Y. 154, *aff'd,* 239 U.S. 195 (1915), several state courts had voided statutes discriminating against aliens in public employment. These two cases, which marked the reversal of this trend, were based upon dictum in Atkin v. Kansas, 191 U.S. 207 (1903). In holding a Kansas eight-hour law for public works employment to be unconstitutional, the *Atkin* court stated, that since nobody was entitled to work for the state, it was the state's prerogative to establish conditions upon which it would permit public work. 119 U.S. at 222-23. Although the decision is correct on its facts, the dictum has been misapplied. *See Constitutionality of Restrictions on Aliens' Right To Work, supra* note 8, at 1014-17 & n.29; Note, *National Power to Control State Discrimination Against Foreign Goods and Persons, supra* note 14, at 367.

16. 334 U.S. 410 (1948).

Court cast considerable doubt on the continued validity of the proprietary interest rationale. In that case, a California statute, purportedly enacted as a conservation measure, barred the issuance of commercial fishing licenses to persons ineligible for citizenship. The law effectively barred resident aliens of Japanese ancestry from procuring licenses, as it was undoubtedly designed to do. The Court concluded that the statute unconstitutionally denied equal protection of the law to Japanese aliens and could not be sustained as reasonably related to the state's legitimate interest in conserving public fishing.

The extent of the protection granted to the alien under *Takahashi* is not entirely clear. The Supreme Court stated that the Equal Protection Clause extended to privileges,[17] and, therefore, it could be argued that it reaches employment itself. In addition, the Court confined the state's power to make classifications based solely on alienage to "narrow limits,"[18] prescient of the suspect classification status later developed by the Supreme Court.[19] However, this broad interpretation of the Supreme Court's construction of the Fourteenth Amendment[20] is arguably defective in two respects. First, *Takahashi* was decided in the context of discrimination which was clearly aimed at the Japanese, who were ineligible for citizenship. A state statute that classifies aliens on the basis of country of origin is more likely to be discriminating on the basis of race rather than citizenship. Thus, the *Takahashi* decision may actually have been premised on racial classification and not on alienage as a suspect class.[21] Second, the Court's concern with the proprietary interest rationale reached only the state's interest in its common property. It was held that any proprietary interest of the state as trustee-owner of the fish was insufficient to justify the exclusion of aliens from commercial fishing.[22] Thus, while striking a severe blow to the validity

17. *Id.* at 420.
18. *Id.*
19. Alienage has been referred to as a suspect basis of classification as a result of three cases: Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948); Oyama v. California, 332 U.S. 633 (1948); Korematsu v. United States, 323 U.S. 214 (1944). *Developments in the Law: Equal Protection, supra* note 5, at 1082. *See* Note, *State Discrimination Against Mexican Aliens,* 38 GEO. WASH. L. REV. 1091, 1102 (1970); Note, *Protection of Alien Rights Under the Fourteenth Amendment,* 1971 DUKE L.J. 583, 589.
20. The Court did eventually settle on this broad interpretation of *Takahashi. See* notes 38-40 *infra,* and accompanying text.
21. This is the position taken by Mr. Justice Rehnquist in his dissenting opinion to Sugarman v. Dougall and *In re* Griffiths, 413 U.S. 634, 651-57 (1973).
22. 334 U.S. at 421:

> To whatever extent the fish . . . may be "capable of ownership" by California, we think that "ownership" is inadequate to justify California in excluding any or all aliens who are lawful residents of the State from making a living by fishing in the ocean off its shores while permitting all others to do so.

of the proprietary interest rationale by rejecting the state's interest in common property, *Takahashi* did not conclusively determine the validity of state control over the activity itself[23]—public employment.

B. The Police Power Rationale

The state's police power has been the more comprehensive of the two discriminatory rationales. However, despite the traditional presumption in favor of constitutionality where legislation purported to be a valid exercise of police power,[24] it has long been recognized that the Fourteenth Amendment protects the alien against laws valid on their face, but discriminatory in their application.[25] Expanding upon this principle, the Supreme Court in *Truax v. Raich*[26] held that a state's interest in promoting the health, safety, morals and welfare of its citizens would not justify denying aliens the right to work in the "common occupations of the community."[27] Although not reaching the issue of the state's police power to regulate harmful, vicious and anti-social occupations, *Truax* established the groundwork for later decisions which brought within the category of "common occupations" many occupations previously subject to discriminatory regulation on the basis of state police power.[28]

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23. *But see id.* at 430 (Reed, J., dissenting).

24. Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962).

25. In Yick Wo v. Hopkins, 118 U.S. 356 (1886), a purported fire prevention ordinance required the licensing of laundries constructed of wood. The officials administering the regulation passed on approximately 280 applications; the 200 applications by Chinese aliens were all denied. The Court held at 373-74:

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

26. 239 U.S. 33 (1915). In *Truax* the plaintiff, a native of Austria and an inhabitant of Arizona, was discharged from employment under a state statute requiring that any employer of more than five workers must employ not less than eighty per cent United States citizens. The Court held that:

> [T]he power of the State to make reasonable classifications in legislating to promote the health, safety, morals and welfare of those within its jurisdiction . . . does not go so far as to make it possible for the State to deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood. It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure.

Id. at 41 (citations omitted).

27. *Id.* at 41.

28. *E.g.*, State v. Ellis, 181 Ore. 615, 184 P.2d 860 (1947) (barber); *see also* Wormsen v. Moss, 177 Misc. 19, 29 N.Y.S.2d 798 (Sup. Ct. 1941) (massage parlor operator).

II
STRICT JUDICIAL REVIEW

The degree of Fourteenth Amendment protection extended to the alien under *Takahashi* was unclear from the outset. However, that decision received extensive interpretation in *Purdy & Fitzpatrick v. State,*[29] in which the California Supreme Court invalidated a state statute[30] prohibiting the employment of aliens on public works projects. The statute was vulnerable both as an interference with the congressional scheme for immigration and naturalization[31] and as a violation of the Fourteenth Amendment. In deciding the equal protection issue, the court summarized the development of the law in this area and reached two general conclusions concerning *Takahashi.* First, the court construed *Takahashi* as formulating a requirement of strict judicial review of statutes which discriminate against aliens as a class.[32] This more intensive standard of review, first explicitly articulated by the United States Supreme Court in *Shapiro v. Thompson,*[33] is invoked where a classification either affects the exercise of a fundamental right or is based upon suspect criteria. Not only must the classification reasonably relate to the purposes of the law,[34] but the state must bear the burden of establishing that the classification constitutes a necessary

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29. 71 Cal. 2d 566, 456 P.2d 645, 79 Cal. Rptr. 77 (1969).

30. The statute provided:

> No contractor or subcontractor or agent or representative thereof shall knowingly employ or cause or allow to be employed on public work any alien, except in cases of extraordinary emergency caused by fire, flood, or danger to life or property, or except on work upon public military or naval defenses or works in time of war.

Id. at 568 n.1, 456 P.2d at 647 n.1, 79 Cal. Rptr. at 79 n.1.

31. Congress possesses the exclusive right to regulate immigration and naturalization. U.S. CONST. art. I, § 8, cl. 4; Fong Yue Ting v. United States, 149 U.S. 698 (1893). Restrictions on alien employment may indirectly exclude aliens and thus encroach upon the exclusive federal power over immigration. Thus, in its alternative holding in *Truax,* the Court stated:

> The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government. . . . The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the State would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work.

239 U.S. at 42 (citation omitted).

32. Purdy & Fitzpatrick v. State, 71 Cal. 2d 566, 579, 456 P.2d 645, 654, 79 Cal. Rptr. 77, 86 (1969).

33. 394 U.S. 618 (1969). Legal commentators have conceptualized general notions as to when active scrutiny of a classification is applicable and under what standards. *See* Note, *Protection of Alien Rights Under the Fourteenth Amendment,* 1971 DUKE L.J. 583, 585 n.16.

34. For the formulation of "reasonable relation" see F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

means[35] of promoting a compelling state interest.[36] Although statutes based on suspect classifications are not absolutely prohibited, the courts will vigorously scrutinize them. As applied to the state law in question, the California court concluded that the promotion and establishment of acceptable wages and working conditions in the contract construction industry and the disbursement of common property belonging to the state did constitute legitimate interests within the state's power. Yet, when subjected to stringent equal protection analysis, the classification based on alienage was not rationally related to that goal.

The second conclusion reached by the court in *Purdy* was that the *Takahashi* decision, which had explicitly rejected the state's asserted proprietary interest in its fish, cast considerable doubt upon the legitimacy of the proprietary interest rationale in all contexts, including the area of public employment.

Purdy's recognition of alienage as a suspect classification requiring strict judicial review presaged a new level of protection for the alien. The effect of this California decision, however, was not clear. The inclusion of an additional ground for the decision—interference with federal power over immigration—suggests that the court may have had less confidence in the suspect classification rationale than one might infer from a literal reading of the equal protection analysis. Moreover, the justifications alleged by the state would have been questionable even under the permissive standard of review.[37]

The suspect nature of the alienage classification was conclusively decided two years later by the United States Supreme Court in *Graham v. Richardson.*[38] Interpreting *Takahashi* as establishing that alienage is a suspect classification,[39] the Court in *Graham* concluded that provisions

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35. Loving v. Virginia, 388 U.S. 1, 11 (1967); McLaughlin v. Florida, 379 U.S. 184, 196 (1964).

36. 394 U.S. at 637-40. *See Developments in the Law: Equal Protection, supra* note 5, at 1076-77; Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights,* 80 HARV. L. REV. 91, 95 (1966).

37. *See* Note, *Aliens—Employment on Public Works—California's Prohibition Against Contractors Employing Aliens on Public Works Declared Unconstitutional,* 11 HARV. INT'L L.J. 228, 236 (1970).

38. 403 U.S. 365 (1971).

39. *Id.* at 372.

But see Mr. Justice Rehnquist's dissenting opinion to Sugarman v. Dougall and *In re* Griffiths, 413 U.S. 634, 649 (1973) (single dissent to two opinions), where he sets forth a cogent and comprehensive argument that neither the decided cases nor the philosophy behind the special protection of the strict standard necessitates that alienage be made a suspect classification. *See also Developments in the Law: Equal Protection, supra* note 5, at 1088, 1126-27; Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment,* 83 HARV. L. REV. 7, 33 (1969); Note, *Aliens—Employment on Public Works*

of state welfare laws conditioning benefits on citizenship and imposing durational residency requirements on aliens violated the Equal Protection Clause. Classifications based on alienage were "inherently" suspect because aliens as a class constitute a prime example of a "discrete and insular minority"[40] for whom heightened judicial solicitude is appropriate.

The *Graham* decision, however, did not conclusively determine the status and scope of the proprietary interest rationale. Although the Supreme Court dealt with this issue, its holding was limited to the welfare context. Reasoning that aliens contribute to tax revenues on an equal basis with citizen-residents of the state and have the same armed services obligations, the Court held that the state's "special public interest"[41] in tax revenues could not support the state's desire to preserve limited welfare benefits for its own citizens. The Court rejected the concept that constitutional rights may be made to depend upon whether a government benefit is characterized as a privilege or a right.[42] Thus, while rejecting the proprietary interest rationale in the context of public assistance, the Court left undecided the doctrine's vitality in other contexts.[43]

—California's Prohibition Against Contractors Employing Aliens on Public Works Declared Unconstitutional, supra note 37, at 236.

40. 403 U.S. at 371-72. Mr. Justice Stone's well-known footnote serves as a basis for special consideration given minorities unable to find protection in the political process:

> [P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938). *See* Hobson v. Hansen, 269 F. Supp. 401, 507-508 n.198 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

The Court's reliance upon Mr. Justice Stone's statement which is contained in a footnote and which arguably should not apply to aliens is criticized by Mr. Justice Rehnquist in his dissenting opinion to Sugarman v. Dougall and *In re* Griffiths, 413 U.S. at 649.

41. *See* note 10 *supra.*

42. 403 U.S. at 374. *See also* Bell v. Burson, 402 U.S. 535, 539 (1971); Goldberg v. Kelly, 397 U.S. 254, 262 (1970); Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969); Sherbert v. Verner, 374 U.S. 398, 404 (1963).

The Court placed special emphasis on the language of *Shapiro:*

> "[A] State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. . . . The saving of welfare costs cannot justify an otherwise invidious classification." 394 U.S. at 633.

403 U.S. at 374-75. Since an alien as well as a citizen is a "person" for equal protection purposes, this language was recognized as applicable to the present case.

43. The Court held:

> *Takahashi v. Fish & Game Comm'n* [citation omitted], however, cast doubt on the continuing validity of the special public-interest doctrine in all contexts. . . .

The applicability of the strict standard of equal protection review and the status of the proprietary interest rationale in the employment context were squarely before the Supreme Court in *Sugarman v. Dougall.*[44] At issue in that case was the constitutional validity of section 53 of New York's Civil Service Law,[45] which prohibited the employment of aliens in the competitive classified civil service.[46] Applying the stringent standard of judicial review as required by *Graham's* recognition of alienage as a suspect classification, Justice Blackmun examined the statute in light of the substantiality of New York's interest in enforcing the restriction and the precision of the limits confining the discrimination. As a justification for the discrimination existing under section 53, the state alleged an interest in having a civil service of undivided loyalty involved in the formulation and execution of government policy. Such loyalty was regarded by the state as necessary both to protect an employee's freedom of judgment against potential conflicts of interest and to promote public confidence in its decision-makers.

Although the Court recognized the state's broad power to define its political community,[47] it held that an alien could be refused or discharged from public employment for reasons of noncitizenship only after a specific determination of the characteristics of the individual applicant or employee and his qualifications for a particular position.[48]

> Whatever may be the contemporary vitality of the special public-interest doctrine in other contexts after *Takahashi,* we conclude that a State's desire to preserve limited welfare benefits for its own citizens is inadequate to justify Pennsylvania's making non-citizens ineligible for public assistance, and Arizona's restricting benefits to citizens and long-time resident aliens.

403 U.S. at 374.

44. 413 U.S. 634 (1973).

45. "Except as herein otherwise provided, no person shall be eligible for appointment for any position in the competitive class unless he is a citizen of the United States." N.Y. CIV. SERV. LAW § 53(1) (McKinney 1973).

46. Plaintiffs, resident aliens of the United States and residents of New York, were discharged from their competitive civil service positions because of their noncitizenship. They filed a class action challenging the constitutionality of section 53 and sought damages and declaratory injunctive relief.

47. In defining the State's power to preserve its conception of "political community," the Court stated:

> And this power and responsibility of the State applies, not only to the qualifications of voters, but also to persons holding state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government. There, as Judge Lumbard phrased it in his separate concurrence, is "where citizenship bears some rational relationship to the special demands of the particular position." 339 F. Supp. at 911.

413 U.S. at 647.

48. *Id.* at 646-47.

When examined in light of New York's overall statutory scheme, the competitive class of section 53 potentially reached across the full range of employment, from the menial laborer to the policy-maker. The statute was unnecessarily broad in view of its acknowledged purpose, and therefore, could not withstand the equal protection attack.

The *Sugarman* decision also settled the status of the "special public interest doctrine" as applied to employment.[49] Faced with a situation presenting a clear-cut employment issue, the *Sugarman* Court summarily rejected any vestiges of the notion that a state could restrict its resources for the advancement and profit of its citizens.[50] Relying on the rationale of *Graham,* Justice Blackmun observed that the special public interest doctrine was rooted in the concepts of privilege and the desirability of confining the use of public resources. However, since an alien's public obligations are generally the same as those of a citizen, the doctrine cannot justify limiting or denying public employment of aliens. Furthermore, the Supreme Court's rejection in *Sugarman* of the state's proprietary interest in the occupation itself was a final repudiation of a state's right to discriminate against aliens for the purposes of conserving state resources and improving local labor market conditions.

III

IMPACT AND IMPLICATIONS

The impact of *Sugarman* extends to all forms of state restrictions on alien employment, even though the case itself involved only a blanket prohibition against aliens in public employment. While the decision clearly did not make all restrictions on alien employment unconstitutional, it did establish guidelines within the acknowledged stringent test of the Equal Protection Clause for determining the validity of discriminatory employment statutes. These guidelines will enable other courts to determine the validity of all state laws which limit or deny occupational opportunities on the basis of alienage.[51] The Supremacy

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49. *See* note 10 *supra.*

50. 413 U.S. at 645-46.

51. The impact of these statutes on the alien is substantial. In 1972 there were 4,422,000 aliens registered in the United States (all aliens residing in the U.S., except foreign governmental officials and their dependents, representatives to international organizations, and Mexican agricultural workers registered with the Department of Justice). U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1973, at 100 (94th ed.).

Restrictions on public employment alone potentially have great impact on this alien

Clause rationale, previously adopted in cases holding discriminatory state statutes unconstitutional, is no longer necessary to buttress the equal protection attack.

As a broad proposition, Justice Blackmun held that alienage may now be used as a criterion for denying public employment *only* after an "individualized determination" of the relation of legitimate state interests to the requirements of the particular position and the qualifications of the particular alien applicant or employee.[52] Not only must the state's interest be legitimate, but the classification must be necessary to safeguard that interest. Discriminatory legislation must be narrowly confined and precise in its application.[53]

One may argue that, in practice, a statutory classification based on a criterion other than alienage should be demanded only when it is plausible, as well as financially and administratively feasible.[54] However, in light of the rationale of *Graham* and *Sugarman* concerning the obligations of the alien to the state, added expense and inefficiency[55] should not justify the failure to establish alternative classifications. Thus, when alienage is the basis for a classification, the Equal Protection Clause places a heavy burden on the state to prove that a more narrowly defined classification is not administratively feasible. Where the state has the means to determine on a case-by-case basis the fitness of an applicant for employment—as through testing, training, character investigations, or a sworn oath—a flat statutory prohibition against aliens will not withstand strict judicial scrutiny.[56] The possibility that some aliens might be unsuited for employment is no justification for a ban on the employment of all aliens. Implicit in this reasoning is a

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population. There were 1,097,000 state and local government employees in New York in 1972. *Id.* at 434. State and local government employees throughout the U.S. in 1972 totalled 10,809,000. *Id.* at 433.

52. 413 U.S. at 646.

53. *Id.* at 643.

54. *See Developments in the Law: Equal Protection, supra* note 5, at 1102.

55. In answer to the contention that employing aliens in career civil service positions would be inefficient because many aliens would leave their positions, necessitating re-training and re-hiring, the Court concluded:

> As we stated in *Graham,* noting the general identity of an alien's obligations with those of a citizen, the "justification of limiting expenses is particularly inappropriate and unreasonable when the discriminated class consists of aliens." 403 U.S., at 376.

413 U.S. at 646.

56. In *In re* Griffiths, 413 U.S. 717 (1973), the Connecticut bar required training and familiarity with Connecticut law, as well as an "attorney's oath" in which the new lawyer promised to perform his functions faithfully and honestly. To prevent an applicant from entering the bar solely due to his status as an alien, when procedures were available for a case-by-case determination of qualifications, was unconstitutional.

rejection of any remaining belief by the executive or legislative branches of government in the justification based on alienage-linked traits.

In addition to narrowing the limits of such statutory discrimination, the Supreme Court will now review the substantiality of the state's interest in enforcing the statute. The valid state interests set forth in *Sugarman* as being substantial and hence permissible are very narrow. In recognition of a state's continuing but limited power to establish classifications based on alienage in public employment statutes, the Court mentioned only a state's interest in defining its political community, and its corresponding interest in establishing the qualifications for persons involved in the formulation, execution, or review of broad public policy.

Sugarman's companion case, *In re Griffiths*,[57] provides further insight into the nature of valid state interests justifying statutory, employment-related discrimination based on alienage. The *Griffiths* case examined the constitutional validity of a state court rule which denied aliens the right to take the Connecticut bar examination.[58] While recognizing that a state has a substantial and constitutionally permissible interest in determining whether an applicant possesses the character and general fitness required of an attorney, the Supreme Court held that the state failed to meet its burden of establishing that the state court rule was necessary to its interest in maintaining high professional standards. The Court once again stressed the notion—this time outside the realm of public employment—that the powers and responsibilities held by the alien would not involve matters of state policy or acts of unique responsibility that could be entrusted only to citizens. The Court noted that a lawyer is not an "office holder,"[59] and,

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57. *Id.*

58. The Plaintiff was a citizen of the Netherlands and a resident of Connecticut. After her graduation from law school, she was refused permission to take the Connecticut bar examination. The County Bar Association found her qualified in all respects except for the fact that she was not a citizen of the United States as required by Rule 8(1) of the Connecticut Practice Book (1963). On this basis, the County Bar Association refused to allow Plaintiff to take the examination.

59. Until as recently as 1958, no state allowed an alien to practice law. Note, *Constitutionality of Restrictions on Aliens' Right to Work, supra* note 8, at 1027 nn.108-10. *See* M. KONVITZ, *supra* note 1, at 188. The cases almost unanimously upheld this exclusion.

Among the reasons traditionally supported by legal writers for the exclusion of aliens from legal practice were: (a) the attorney is an officer of the court and, therefore, should be a citizen, and (b) the alien cannot take the necessary oath to the Constitution. Note, *Constitutionality of Restrictions on Aliens' Right to Work, supra* note 8, at 1027 n.110. Both of these arguments were rejected by the Court in *Griffiths*. The Court held that although lawyers have traditionally been leaders of government, a lawyer is not an officer in the

therefore, held that the state court rule restricting admission to the bar to citizens of the United States was not supported by a state interest so compelling as to withstand strict judicial scrutiny under the Equal Protection Clause.

When read together, *Sugarman* and *Griffiths* suggest that, apart from the exception recognized for the "formulation, execution, and review of public policy," the only basis for restrictions in the employment of aliens is the actual character and fitness of the individual without regard to his or her status as an alien. Thus, since the mere status as an alien will no longer suffice to justify such discrimination, the Court seems to indicate that it can imagine only one compelling interest sufficient to save a statute restricting alien employment—the public policy exception. The analysis is now limited to determining whether the statute is sufficiently narrow so as to fall within this permissible interest. This new standard therefore casts considerable doubt upon the continued validity of all state statutory restrictions on alien employment which were previously justified by the special public interest doctrine or as a valid exercise of police power.[60] Moreover, it is

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ordinary sense. "Nor does the status of holding a license to practice law place one so close to the core of the political process as to make him a formulator of government policy." 403 U.S. at 729.

As to the requirement of an oath, persons other than citizens can in good conscience take an oath to support the Constitution, and the state may properly conduct a character investigation to determine the applicant's true beliefs. *Id.* at 725-26.

60. For example, under New York statutes, aliens may not be admitted to practice law, N.Y. CIV. PRAC. RULE 9406 (McKinney 1963); may not teach in public schools unless they apply to and do become citizens within a specified time, or are employed pursuant to regulations permitting such employment, N.Y. EDUC. LAW § 3001 (McKinney 1970); except under certain circumstances, may not obtain temporary teaching certificates for up to two years, N.Y. EDUC. LAW § 3001-a (McKinney 1970); will be employed on public works only if citizens are not available, N.Y. LABOR LAW § 222 (McKinney 1965); except in certain areas of acute shortage of qualified personnel, may not be employed in civil service in "competitive" classes of jobs, N.Y. CIV. SERV. LAW § 53 (McKinney 1973); alien employees of private enterprises acquired by the State may only continue in positions classified as competitive if within one year of classification they file a declaration of intention to become a citizen, N.Y. CIV. SERV. LAW § 45(1) (McKinney 1973); may not be gunsmiths or deal in firearms, N.Y. PENAL LAW § 400.00(1) (McKinney 1967); may not personally, or as a participant in a business, manufacture or sell alcoholic beverages, N.Y. ALCO. BEV. CONTROL LAW § 126(3), (4) (McKinney 1970); may not obtain a license to practice medicine, or become a licensed chiropractor, dentist, dental hygienist, veterinarian, pharmacist, or certified shorthand reporter, or licensed masseur, without becoming a citizen or filing a declaration of intention to become a citizen in accordance with the commissioner's regulations, N.Y. EDUC. LAW §§ 6524, 6554, 6604, 6609, 6704, 7324, 7502, 7804 (McKinney 1970).

Twenty-two states have conditions for employment on public work projects which deny or restrict employment of aliens. Comment, *Equal Protection and Supremacy Clause Limitations on State Legislation Restricting Aliens, supra* note 1, at 141 n.25. *See* Note, *Constitutionality of Restrictions on Aliens' Right to Work, supra* note 8. *See generally* M. KONVITZ, *supra* note 1; 5 VERNIER, AMERICAN FAMILY LAWS 295 (1938); Chamberlain, *Aliens and the Right to*

interesting to note that this test is more stringent than that required by international standards.[61]

After reaching the conclusion in *Sugarman* that the state statute violated the Fourteenth Amendment's equal protection guarantee, the Supreme Court determined that it was unnecessary to reach the issue of whether the citizenship requirement was in conflict with the comprehensive regulation of immigration and naturalization by the Congress.[62] Thus, it is no longer necessary to regard the Equal Protection Clause as merely a supplemental or alternative standard against which to test the constitutional validity of statutes discriminating against aliens. A state now stands forewarned that ingenuity in structuring a narrow restriction or a change in the federal naturalization and immigration scheme will not shield a statute from constitutional attack.[63] The possibility that narrower statutory restrictions might not invade the exclusive federal power of Congress and could be supported by the state's interest in preserving the local labor market is no longer a viable alternative. All restrictions on the employment of aliens will be subject to equal protection attack under the strict standard of judicial review and will be upheld only to the extent justified by the state's compelling interest in the "formulation, execution and review of public policy."

CONCLUSION

The recognition of alienage as a suspect classification essentially requires that aliens be treated as citizens.[64] The permissive standard of

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Work, 18 A.B.A.J. 379 (1932); Note, *Constitutionality of Legislative Discrimination Against the Alien in his Right to Work,* 83 U. PA. L. REV. 74, 76 n.9 (1934).

The Supreme Court in *Sugarman* did not express a view as to whether federal citizenship requirements for federal service are susceptible to constitutional challenge. 413 U.S. at 646 n.12. *See* Jalil v. Hampton, 460 F.2d 923 (D.C. Cir. 1972), *cert. denied,* 409 U.S. 887 (1972); Note, *Aliens and the Civil Service: A Closed Door?,* 61 GEO. L.J. 207 (1972).

61. International standards impose only a test of reasonableness upon alien restrictions. Restrictions upon the economic opportunities of aliens in order to promote a legitimate national interest are not unusual and the exclusion of aliens from public works employment is accepted. Note, *Aliens—Employment on Public Works—California's Prohibition Against Contractors Employing Aliens on Public Works Declared Unconstitutional, supra* note 37, at 233 nn.27 & 28, 235 n.32.

62. 413 U.S. at 646.

63. *See* Note, *Aliens—Employment on Public Works—California's Prohibition Against Contractors Employing Aliens on Public Works Declared Unconstitutional, supra* Note 37, at 235.

64. The Constitution itself recognizes a basic difference between citizens and aliens in at least 10 important areas: representatives and senators must be citizens, U.S. CONST. art. I, § 2, cl. 2 & 3; Congressional authority "to establish a uniform Rule of Naturalization," U.S. CONST. art. I, § 8, cl. 4; judicial authority of the federal courts extends to suits

equal protection review was never capable of offering such extensive protection. The Supreme Court's analysis in *Sugarman* implies that the scope of state interests offered as justifications for statutes denying or limiting occupational opportunities available to aliens must be very narrow to withstand strict judicial scrutiny.[65] The justification based solely on alienage-linked traits is implicitly rejected and a case-by-case determination of the fitness of an applicant for employment is now required wherever possible. Arguably, the "formulation, execution, and review of public policy" standard arising out of *Sugarman* and *Griffiths* suffers from the vice of inhibiting future analysis.[66] However, in light of the alien's obligations to the state and his lack of political impress at the polls,[67] it is difficult to differ with the policy implicit in the Supreme Court's statement of the law.

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involving citizens of the United States "and foreign States, Citizens or Subjects," U.S. CONST. art. III, § 2, cl. 5; the Eleventh Amendment; the relevance of the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments only to citizens; requirement that the President must be a "natural born citizen," U.S. CONST. art. II, § 1, cl. 5. All of these distinctions, however, except U.S. CONST. art. III, § 2, cl. 5, come within the "formulation, execution, and review of policy" rubric. *See* Mr. Justice Rehnquist's dissent in Sugarman v. Dougall and *In re* Griffiths, 413 U.S. at 649.

65. On the authority of *Sugarman,* the Court of Appeals affirmed a summary judgment of the District Court which held that a civil service rule excluding aliens from employment was unconstitutional. Mendoza v. Miami, 483 F.2d 430 (5th Cir. 1973).

66. For instance, in his dissenting opinion in *Sugarman* and *Griffiths,* Mr. Justice Rehnquist suggests several additional justifications for limiting alien employment: (1) the de facto decision-making or policy-making authority in the hands of employees not generally considered to be in legislative or high-level administrative positions; (2) the need for familiarity with political and social values necessary for efficient government; and (3) an understanding of the American political and social experience required of those having some authority to alter social relationships and institutions of our society through the judicial process. 413 U.S. at 661-64.

67. One commentator has suggested that the lack of suffrage for residents of the District of Columbia impelled the rigorous judicial review of the regulatory scheme involved in Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969). *See Developments in the Law: Equal Protection, supra* note 5, at 1126 n.278.